Supreme Court, U.S.
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No. 71-269

# In the Supreme Court of the United States

OCTOBER TERM, 1971

NATIONAL BREWING COMPANY, PETITIONER

*v.*

ROBERT CALDWELL, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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## MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to this Court's order of December 20, 1971, inviting the Solicitor General to file a brief expressing the views of the United States in this case.

The court below held that Title VII (the equal employment opportunity provisions) of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, does not preclude the bringing of a civil action under 42 U.S.C. 1981 by one who alleges racial discrimination in employment, but who has not availed himself of the administrative proceedings available under Title VII.

Petitioner suggests two reasons for this Court to review this decision. Petitioner claims, first, that the

court of appeals erroneously decided an important question of federal law, and, second, that its decision has produced a conflict among the courts of appeals. We disagree.

1. In *Jones* v. *Mayer*, 392 U.S. 409, this Court ruled that 42 U.S.C. 1982, which was derived from Section 1 of the Civil Rights Act of 1866 and which, among other things, forbids racial discrimination in the sale and rental of property,[1] reaches purely private acts of discrimination. The Court held that Congress had authority under the Thirteenth Amendment to enact such legislation, and that the Fair Housing title of the Civil Rights Act of 1968 "had no effect upon § 1982 * * *." 392 U.S. at 416.

This Court also noted in *Jones* that 42 U.S.C. 1981, which gives to persons of all races an equal right "to make and enforce contracts," was also derived from Section 1 of the 1866 Civil Rights Act. See 392 U.S. at 422 n. 28, 441–442 n. 78. Relying in part on *Jones*, the three courts of appeals which have considered the question have each held that Section 1981 created a right of individuals to be free from private racial discrimination in employment, for "[i]n the context of

[1] In *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, the Court similarly ruled that Title II of the Civil Rights Act of 1964, dealing with public accommodations, in no way "supersedes the provisions of the 1866 Act." 396 U.S. at 237.

In addition to the decisions below, see *Dyson* v. *Interoperations of Telephone & Telegraph Co.*, 438 F.2d 735 (C.A. 5); *Watson* v. *Wisconsin Steel Works of International Harvester*, 427 F.2d 476 (C.A. 7), certiorari denied, 400 U.S. 911. See also *Sanders* v. *Dobbs Houses, Inc.*, 431 F.2d 1097 (C.A. 5), certiorari denied, 401 U.S. 948.

the Reconstruction it would be hard to imagine to what contract right the Congress was more likely to have been referring." All three courts have also ruled that Title VII of the Civil Rights Act of 1964 did not constitute an implicit repeal of Section 1981.

In *Jones* the Court compared Section 1982 with the Fair Housing title of the 1968 Civil Rights Act and noted the

> * * * vast differences between, on the one hand, a general statute applicable only to racial discrimination * * * and enforceable only by private parties acting on their own initiative, and, on the other hand, a detailed * * * law applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority [392 U.S. at 417].

Because of the distinction between the two Acts, and because the "Civil Rights Act of 1968 does not mention 42 U.S.C. § 1982," the Court could not "assume that Congress intended to effect any change, either substantive or procedural, in the prior statute." 392 U.S. at 416–417, n. 20.

In *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, this Court rejected the contention that Section 1982 was in effect a public accommodations law and hence had been limited by Title II (the public accommodations provisions) of the Civil Rights Act of 1964. The Court noted the clause in Title II saving prior legislation and ruled that "the hierarchy of administrative machinery provided by the 1964 Act is not at war with

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[illegible] supra, 418 F.2d at 790.

survival of the principles embodied in § 1982." 396 U.S. at 237.

The principles established in *Jones* and *Sullivan* concerning the relationship between Section 1982 and the civil rights legislation of the 1960's apply with equal force here. Like Section 1982, Section 1981 is derived from the 1866 Civil Rights Act and is a "general statute applicable only to racial discrimination * * * and enforceable only by private parties acting on their own initiative." And, like the 1968 Fair Housing title, Title VII is a complex "law applicable to a broad range of discriminatory practices" which is "enforceable by a complete arsenal of federal authority."

2. Petitioner does not seem to contest the basic correctness of the decision below insofar as it held that Section 1981 prohibits private discrimination in employment on the basis of race. Rather, petitioner suggests that an important difference has arisen among the circuits concerning the most appropriate means of implementing—in cases brought under Section 1981 alleging racial discrimination in employment—the congressional policy of conciliation embodied in Title VII of the 1964 Civil Rights Act. The alleged conflict appears, however, to be primarily speculative at present. All three courts of appeals which have considered the question agree that:

> (1) Congress in 1866, in what is today 42 U.S.C. 1981, prohibited racial discrimination in private employment;
>
> (2) Congress in enacting Title VII of the Civil Rights Act of 1964 did not implicitly repeal Sec-

tion 1981 as it applies to employment discrimination;

(3) Title VII embodies a congressional preference for conciliation of disputes involving alleged discrimination in employment; and

(4) Section 1981 should be applied so as to further the policy of conciliation.

The court below and the court in *Young, supra*, both reasoned that the policy of conciliation can best be effectuated by flexible exercise of the district court's discretion, once a Section 1981 action has been instituted. As the court below pointed out, the district court can stay proceedings, for example, if settlement appears likely,[1] and in Section 1981 cases the Equal Employment Opportunity Commission, created by Title VII to investigate and attempt to conciliate complaints alleging employment discrimination, is available to assist in conciliation if such assistance is requested by a company or union. 42 U.S.C. 2000e–4 (f)(4). The Seventh Circuit in *Waters* stated that plaintiffs should be encouraged to resort to the possibility of conciliation by EEOC in the first instance, suggesting that a suit under Section 1981 should be open only to complainants who can plead a "reasonable excuse" for failing to avail themselves of Title VII remedies. All three courts, however, sustained the right of the particular complainants before them to sue under Section 1981.

[1] Both courts have noted that the prospects for voluntary settlement may be enhanced where the plaintiff has obtained a preliminary injunction to preserve the status quo.

It is, therefore, by no means clear that there exists any substantial difference between the approaches taken by the courts of appeals which have considered this question. Only if the Seventh Circuit were to adopt a restrictive view of what constitutes a "reasonable excuse," for avoiding Title VII, within the meaning of its dictum in *Waters*, would there be a marked difference between the classes of plaintiffs eligible to sue under Section 1981 in the various courts of appeals. But that court has given no indication that it will adopt such a restrictive interpretation; *Waters* is the only Section 1981 case that court has decided, and there the plaintiffs were permitted to sue on the basis of the 1866 Act. In short, no court of appeals has denied a plaintiff the right to sue under Section 1981.

Because the three courts of appeals which have considered this aspect of Section 1981 agree on the continuing availability of an action under that statute, and because there is no indication that their slightly differing approaches in articulating the congressional policy of conciliation will yield any significant differ-

ence in practical result, we do not believe that review by this Court of the decision below is warranted.[6]

Respectfully submitted.

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DAVID L. NORMAN,
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JANUARY 1972.

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[6] Of course, the present petition by an employer raises no issue concerning whether any of the courts of appeals have, in dictum, adopted unwarranted restrictions on the right of individuals to sue under Section 1981.

There is also some doubt whether the issues posed under the statutes in their present form will be of continuing general importance. In the First Session of the 92d Congress, the House of Representatives passed a bill (H.R. 1746) which would, *inter alia*, make Title VII of the Civil Rights Act of 1964, as amended, "the exclusive remedy of any person claiming to be aggrieved by an unlawful employment practice by an employer, employment agency, or labor organization." H.R. 1746, Section 3(b), passed in the House on September 16, 1971 (117 Cong. Rec. H8540 (daily ed.)). The Senate is currently considering several bills which would amend Title VII, including H.R. 1746. The bill reported by the Senate Committee on Labor and Public Welfare, S. 2515, does not contain any provision comparable to the part of Section 3(b) of H.R. 1746 referred to above.

U.S. GOVERNMENT PRINTING OFFICE 1972